IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1183 OF 2005
WITH
CHAMBER SUMMONS NO.1345 OF 2005
IN
EXECUTION APPLICATION NO.183 OF 2004
IN
SUM.SUIT NO.1510 OF 2002

M/s.G.M.Breweries Ltd. ..Plaintiffs.

V/s.

M/s.Siddhivinayak Builders & Anr...Defendants.

Mr. A.Y.Sakhare, Sr.Counsel with Mr.Chirag Balsara i/b Divya Sanghvi & Associates applicant/defendant.

Mr. D.J.Khambatta, Sr.counsel with F. Divitre, Sr.Counsel and O.A.Das for plaintiffs.

Mr.A.M.Kazi, Dy. Sheriff present.

CORAM: A.M.KHANWILKAR,J

DATE : OCTOBER 19, 2005.

P.C. :

1. Heard counsel for the parties. Perused the pleadings on record. Chamber summons No.1183.05 has been filed for several reliefs. However, during the course of argument, counsel for the applicants/defendants has confined this Chamber Summons to prayer clause (e) . In other words, all other reliefs are not pressed. This is so because, the defendants have instituted suit bearing Suit No.2772 of 2005 for declaration that the consent

terms in question be set aside on the ground that the same were executed by the claimants by playing fraud upon the defendants. It is not necessary to advert to the issues arising in the said Suit No.2772 of 2005.

2. So far prayer as clause (e) is concerned, the same read thus.

> (e) that this Hon'ble Court be pleased to set aside the Warrant of Attachment of Movable Property dated 5th July, 2004 and raise the attachment levied on the movable properties listed in Exhibit "A" hereto;"

This relief is claimed on the argument that pursuant to the order dated 11th August, 2005 passed by this Court the applicants/defendants have deposited sum of Rs.1 Lakh, as a consequence of which, attachment with regard to the movable properties will have to be raised. According to the plaintiffs/decree holder however, the present chamber summons is founded on the allegations that the consent terms have been executed by playing fraud upon the defendants. Besides, there is no foundation laid for relief in terms of clause (e) on the ground which is now

pressed into service at the time of argument. To get over this position, counsel for the applicants/defendants has relied on paragraph 18 of the affidavit wherein it is stated that pursuant to order passed by this Court defendants have deposited entire amount in respect of movable properties in this court for which reason, attachment in respect of the movable properties have to be raised to that extent.

3. Indeed, the ground canvassed before this court on behalf of the defendants to press prayer clause (e) does appear in the affidavit as filed. However, for the reasons mentioned hereinafter while dealing with companion Chamber Summons No.1345 of 05, applicants do not deserve any indulgence of this court on account of their conduct.

4. Be that as it may, the companion Chamber Summons No.1345 of 2005 is filed by the defendants/-applicants for the following reliefs.

(a) that without prejudice to Chamber Summons No.1183 of 2005 and Suit No.2772 of 2005, the office of the Sheriff be

ordered and directed to include in the terms and conditions of the sale in respect of the said immovable property being Nirmal Bungalow No.42, Road No.10, JVPD Scheme, Mumbai 400 054 that:-

(i) Defendant No.2 is only a tenant in respect thereof and is not the owner of the said immovable property.

(ii) that the sale of the said immovable property is being effected subject to the aforesaid warrant of attachment issued by Income Tax Department for an amount of Rs.1,78,23,265/- and warrant of attachment for an amount of Rs.4,91,60,000/- issued in the said Suit No.4870 of 1998i.

(b) that pending the hearing and final disposal of the Chamber Summons, the sale of the said immovable property being Nirmal Bungalow No.42, Road No.10, JVPD Scheme, Mumbai 400 054 be stayed.

(c) for interim and ad-interim reliefs in terms of prayer clause (a) and (b) above.

(d) for the costs of the Chamber Summons; and

(e) for such further and other reliefs as the nature and circumstances of the case may require.

In so far as relief (a)(i) is concerned, it is in two parts. The defendant No.2 who has filed affidavit in support of the Chamber Summons claims that he is only a tenant in respect of the premises being Nirmal Bungalow No. 42, Road No. 10,JVPD Scheme, Mumbai 400 054 and not owner thereof. This assertion is made on affidavit in support of the present Chamber Summons. However, this assertion is completely contrary to the affidavit filed before this court on the earlier occasion in Execution Application No.183 of 2004 in Summary Suit No.1510 of 2002. In the said affidavit dated 30th June, 2005, the defendant No.2 who is the sole affiant in the present chamber summons has stated that he is owner in respect of the

same bungalow to the extent of 25% undivided share, right title and interest therein and remaining 75% was owned and possessed by his wife Jyotsna Nitin Mehta. The Statement made in the affidavit dated 30th June,2005 in fact was supported by the documents executed by the defendant No.2 while purchasing the disputed property in the form of agreement to sale, which clearly provides his names as the owner in respect of the disputed property. It is too late in the day for the defendants to contend that defendant No.2 was only tenant in the disputed property and not owner thereof. Suffice it to observe that defendant No.2 has filed false affidavit before this court in support of the present chamber summons. On this count alone, applicants/ defendants are disentitled for any relief from this court.

5. In addition, prima facie, the defendant No.2 will have to be held responsible for having committed offence within the meaning of provisions in Chapter XI of Indian Penal Code, as was the case in the chamber summons decided on 29th August, 2005 being chamber summons No.11 of 2005 filed, at the instance of his wife Mrs. Jyotsna Nitin Mehta. In paragraph 6 of the order dated 29th August, 2005 for the reasons recorded in the said order, for having taken

false plea before this court and for filing forged and fabricated documents, I have directed initiation of criminal action against the wife of the defendant No.2 as well as initiation of contempt action. Even the defendant No.2 deserves the same action for having filed false affidavit. It is obvious that the proceedings taken out by the wife of the defendant No.2 Mrs. Jyotsna Nitin Mehta must have been on instructions of the defendant No.2 himself.

6. In my opinion, relief (a)(i) claimed in the present chamber summons that it be mentioned in the terms and condition of the sale that defendant No.2 is only a tenant in the disputed premises is malafide and only to create confusion so that the sale cannot be fructified.

7. In so far as relief (a-ii) is concerned, even this relief cannot be granted. I am in agreement with the submission canvassed on behalf of the plaintiff/decree holder that there is no reason to refer in the terms and conditions of the sale (public notice) that the property in question is subject to encumbrances on account of warrant of attachment issued by the Income tax Department or warrant of attachment issued in Suit No.4870 of 1998. In so far

as warrant of attachment in Suit No.4870 of 1998 is concerned, the said attachment has been effected before judgment of said suit. In that sense, defendant is injuncted from dealing with the said property till the disposal of the suit, but that cannot preclude this court from proceeding to dispose of the suit property in execution of decree passed in Summary Suit No.1510 of 2002. The sale of the suit property in execution of Summary Suit No.1510 of 2002 will be subject to the claim of the plaintiff in Suit No.4870 of 1998. Thus understood, it is not necessary to refer encumbrances in the public notice to be issued in relation to the present execution proceedings.

8. In so far as, warrant of attachment issued by the Income Tax Department is concerned, I find substance in the argument canvassed by the counsel for the plaintiff that even the said warrant of attachment cannot be considered as encumbrance for the purpose of recording the same in the public notice to be issued in respect of the proposed sale. Income Tax Department however, would be entitled to recover the sale proceeds to the extent of amount referred to in the attachment issued by the department. This legal position is stated in the

decision of the Apex Court in **the Union of India Vs. Somasundaram Mills Pvt.Ltd. and Anr. 1985 Supreme Court Vol.152 Income Tax Report 420.** In the said decision while referring to the decision in **AIR 1937 Nagpur 80,** the Apex Court has observed that prior attachment as in the present case fastens itself to the sale proceeds.. There is therefore, no inhibition in proceeding with the sale of the immovable property in question without disclosing the fact of warrant of attachment issued by the Income Tax. This is so because, the purchaser will purchase the said property as is and where is basis and the claim of the Income Tax Department will have to be satisfied from the sale proceeds to be recovered after the sale of the disputed property.

5. Accordingly, I proceed to pass the following order.

(A) Chamber summons No.1183 of 2005 is dismissed with costs. Chamber summons No.1345 of 2005 is also dismissed with costs.

(B) Cost for the aforesaid two proceedings quantified at Rs.15,000/- to be paid within two weeks from today.

(C) Registrar(O.S.)/Prothonotary and Senior Master is directed to register complaint against the defendant No.2, who has filed false affidavit before this court stating that he is only a tenant in the disputed premises, when in earlier affidavit filed by him he has taken a clear stand that he was owner to the extent of 25% in the suit property. Besides, such affidavits have been used in the proceedings before this court, constituting offence within the meaning of provision of Chapter XI of the Indian Penal Code.

(D) In addition, office to issue show cause notice to the defendant No.2 calling upon him why he should not be proceeded against for having committed criminal contempt of this court by filing false affidavit before this court. That notice is made returnable 6 weeks.

(E) Ordered accordingly.